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IN THE
SUPREME COURT OF THE UNITED STATES

National Parks Conservation Association
and Sierra Club,
Petitioners,
v.
Tennessee Valley Authority,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

The petition showed that the court of appeals erred in concluding that petitioners' claims for relief in this Clean Air Act citizen enforcement action were barred under 28 U.S.C. 2462. As other courts have held, the obligation to obtain a permit under the Prevention of Significant Program is ongoing during the operation of a facility and is not somehow waived if the operator unlawfully constructs a project without a permit. The petition also showed that the court of appeals erred in any event by applying the "concurrent remedy" doctrine to invent a time-bar governing equitable relief and by holding petitioners' statutory notice inadequate as to their NSPS claims.

The brief in opposition – reconciling "competing views within the federal government," Opp. 9 n.4 – unveils an abrupt about-face from the position respondent urged throughout the lengthy proceedings in the lower courts. Much of brief (Opp. 9-19) is devoted to new arguments, similar to *petitioners'* arguments throughout this case, that the PSD statute and applicable regulations impose ongoing obligations that may be enforced even after the unlawful "construction" has taken place.

Having urged just the opposite position below, respondent now acknowledges that the Eleventh Circuit's ruling was deeply flawed. Thus, it now concedes that the court of appeals "misunderstood a number of features" of the Alabama SIP and of the "CAA scheme in which they operated" and that the "court's conclusion that these provisions did not create an ongoing obligation to comply" was "erroneous." Opp. 9.

The Government's confession of error implicates not just the reasoning of the Eleventh Circuit, but also

its judgment. Had the court of appeals accepted the position urged by petitioners – which, with the filing of the Opposition, has now become the "unified position of the federal government as a whole" (Opp. 9) – the court of appeals would have been obligated to remand the case to the district court to address the merits.

I

The Government's Confession of Error on the Ongoing Nature of PSD Violations Warrants Reversal or, at a Minimum, Vacatur of the Decision Below and Remand to the Lower Courts

The government's current position -- that PSD permit obligations are ongoing and enforceable -- represents a dramatic change from the position TVA took below. In the court below, TVA broadly argued petitioners claims were time-barred because "the relevant *act* prohibited [by the NSR provisions] is *construction,* not *operation.*" Doc. 100, at 23 (emphasis in original). Now, the government correctly acknowledges that "[t]he PSD provisions are by their terms ongoing requirements applicable to the *operation* of major emitting facilities." (Opp. 14) (emphasis added). Also below, TVA made the broad assertion that the Clean Air Act "allows citizens to sue about *construction* of a new or modified plant without a permit, not about the later *operation* of that newly constructed or modified plant." Doc. 100, at 25 (emphasis in original). The Government's Brief in Opposition directly contradicts TVA's earlier position, which the court below adopted:

> The court of appeals found that distinct language of the citizen suit provision, 42 U.S.C. 7604(a)(3), . . . signaled that Congress did not intend to allow suits based on ongoing violations during a facility's operation. Pet. App. 13a. To the contrary, 42 U.S.C. 7604(a)(1) provides precisely that remedy, as the definition contained in 42 U.S.C. 7604(f)(4) makes clear.

Opp., 16 n. 9. The two opposite positions taken by the Government in this case are reflective of the division among the lower courts over whether PSD permit and BACT obligations are enforceable after construction. *See* Pet. 17-18, 23-24.

Despite spending many pages documenting the court of appeals' many and fundamental errors, the Government nonetheless recommends (Opp.19-21) that the Court let the decision stand. But the reasons given are insubstantial. Having gone on at length about ways in which the Eleventh Circuit's analysis was fundamentally flawed, the Government's efforts to downplay the decision's inconsistency with the Sixth Circuit's analysis are tellingly strained. Thus, for example, the Government suggests the absence of a "direct" conflict between decision below and Sixth Circuit because the Eleventh Circuit's opinion "appears to be tainted by its misunderstanding of SIP and PSD operational requirements and the relationship between the PSD and Title V programs" and because the decision below "may also have been tied" to its misreading of Alabama implementation plan. Opp. 21.

Given the inter-agency disagreement this case implicates, it is not surprising that the Government – having deliberated for five months over its Brief in Opposition – seeks to minimize the Eleventh Circuit's

decision as a "narrow holding" involving a "particular provision of a single State's implementation plan." Opp. 20. But as the Government's own brief elsewhere demonstrates, the Eleventh Circuit's reasoning swept broadly, and rested upon a basic misunderstanding of the fundamentals of the relevant statutory scheme. *See, e.g.*, Opp. at 16 (court of appeals "misperceived the framework of the CAA"). As demonstrated in our petition, the question whether violations of PSD permitting requirements represent ongoing violations that may be remedied so long as the violations continue has generated significant disagreement among the lower courts (and "competing views" within the federal government, *see* Opp. 9 n.4).

The government's reasons for denying "further" review (Opp. 9) of a case in which it has just now reversed its position ring decidedly hollow. First, the Government suggests that *petitioners* are partly to blame for the Eleventh Circuit's errors because our briefs did not discuss Section 16.1.1 of the pre-1985 Alabama regulations. In fact it was TVA that led the court below astray by making the following erroneous argument regarding the pre-1985 regulations:

> [T]he PSD and NNSR regulatory programs specifically forbid only unpermitted construction. Alabama's PSD regulations are entitled "Permits to Construct in Clean Air Areas," and provide that "[n]o . . . major modification shall begin actual construction" without complying with the regulation's requirements. AAPCC Regulation 16.4.8(a) (Add. at A-5, A-14). Similarly, Alabama's NNSR regulations are entitled "Permits to Construct in or near Nonattainment Areas," and impose certain requirements that must be satisfied

> before a "Permit to Construct shall be issued to a person proposing to construct or make a major modification to a major facility." AAPCC Regulation 16.3.2(c) (Add. at A-26, A-29). Both these Alabama programs are preconstruction permit programs and not operating permit programs.

Doc. 100, at 24 (footnote omitted). In this Court, however, the Government concedes (Opp. 11) that:

> In reality * * * the Alabama SIP provisions in effect at the time of the alleged modifications in this case did contain provisions imposing an ongoing obligation to comply with PSD requirements.

In the courts below, petitioners were quite clear that it was *never* legal for TVA to be operating without a permit governing the modification. *See* Appellants' 11th Cir. Brief at 28.[1] Furthermore, because the issue is whether TVA's *current* operations are violating the law, petitioners properly focused their briefing upon demonstrating that TVA's conduct in continuing to operate equipment for which no PSD permit was granted violates the currently binding SIP language. E.g., Appellants' 11th Cir. Reply Brief at 3-6. Moreover, petitioners' briefing in the Eleventh Circuit,

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[1] Petitioners discussed Section 16.1.1 in the petition (Pet., 21-22) in order to address the Eleventh Circuit's effort to distinguish its decision from the Sixth Circuit's decision. See Pet., 18a-19a (Eleventh Circuit's erroneous assertion that the Tennessee SIP contains provision to address sources who had undertaken unpermitted modifications, but the Alabama SIP did not). Petitioners never had an opportunity to brief fully the import of the Sixth Circuit decision because it came down after the Eleventh Circuit briefs in this case were filed.

see 11th Cir. Brief at 30-32, stressed that the language and structure of the Clean Air Act's NSR's provisions unambiguously apply on an ongoing basis – the same point now made at length by the Government. Opp. 13-18. The Court should reject the Government's efforts to cast off responsibility for an Eleventh Circuit ruling that tracked the confessedly erroneous legal arguments it advanced below.

Nor should the Court credit the Government's effort to limit the significance of the Eleventh Circuit's decision. One illustration of the decision's importance is Alabama Power's amicus brief, which asserts that the Eleventh Circuit's decision was correct and defends many of the same erroneous arguments (e.g. PSD permits focus on construction, not operation, *see* Amicus Br. 9) made in a number of incorrect district court decisions that have examined this issue. Pet. 14.[2] If the decision below is left standing, other defendants will follow Alabama Power's lead and argue that it was the Eleventh Circuit, not the Sixth, that got it right. This is particularly true with respect

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[2] Alabama Power challenges petitioners' standing. Amicus Br. 15-17. The challenge is groundless. In the district court, plaintiffs moved for summary judgment, demonstrating that plaintiffs' members are injured by the dark smoke coming from TVA's stack and from poor visibility in the area where the plant is located. Doc. 177, at 15-24. Plaintiffs also submitted direct and expert testimony showing that TVA's alleged violations are related to those injuries, *id.* and that successful resolution of the case will redress those injuries. *Id.* at 24-28. The district court granted plaintiffs summary judgment on standing, a ruling that TVA did not appeal. While Article III standing questions may be raised at any time, that is not a license to advance frivolous standing challenges in an effort to influence the exercise of this Court's discretionary jurisdiction.

to the question of whether, as the Sixth Circuit found, the requirement for modified sources to have BACT emission limitations is a freestanding, ongoing obligation. *See* Pet. 23-24. Alabama Power's erroneous arguments (Br. 11-12) would apply to *any* state's PSD rule that tracks the federal provision, 40 C.F.R. § 52.21(j). *Compare* 40 C.F.R. § 52.21(j) (federal BACT provision) *with* Ala. Admin Code 335-3-14-.04(9)(c), App. 180a, *and* Tenn. Comp. R.& Regs. § 1200-3-9-.01(1)(e). Particularly given the Government's confession of error, Alabama Power's arguments in defense of the decision below tend to strengthen the case for this Court's review.

The government's suggestion (Opp. 22 n. 13) that the statute of limitations issues raised in this case will be sorted out in the future through enforcement actions brought by EPA is also groundless. The argument is belied, among other reasons, by the glacial pace at which these mammoth Clean Air Act enforcement actions have moved through the system.[3] Both this case and the companion Sixth Circuit case were filed in 2001. A similar NSR enforcement action brought by the government against Cincinnati Gas & Electric company, filed in 1999, just went to trial this month. *See United States v. PSI Energy, Inc.*, Case No. 1:99-cv-1963-LJM-JMS. Waiting for further "percolation" of issues that are already confounding the courts and dividing federal agencies is particularly undesirable for cases that take years and massive

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[3] For illustrations of the massive scope of these NSR enforcement actions, *see United States v. Ohio Edison*, 276 F. Supp. 2d 829 (S.D. Ohio 2003); *United States v. S. Indiana Gas and Elec. Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003).

resources to investigate and litigate.

The Government's suggestion that this Court overlook the errors below is also surprising given the enormous environmental and public health significance of the alleged modifications at issue in this case See Opp. 5. For example, Unit 5 at Colbert, because it has *no relevant pollution controls*, emitted a staggering 35,000 tons of sulfur dioxide in 2003. Pet. 9. By way of comparison, the Clean Air Act defines a "major source" as one emitting at least 100 tons a year, 42 U.S.C. § 7479. If petitioners prevail in this case, the new emission limits imposed for this facility will reduce the plant's sulfur dioxide emissions by over 90 percent. *See* Pet. 6. Allowing this erroneous decision to stand would not only leave in place a fundamentally flawed judgment based upon legal theories the Government now acknowledges to be incorrect, but would also allow the subject facilities to continue to emit air pollutants at levels that threaten public health and welfare.

The Government's position that the Court should leave the acknowledged and fundamental errors of the lower court unremedied becomes all the more peculiar – and redolent of a jury-rigged compromise between competing federal agencies – when one recalls that EPA itself identified the facility at issue as warranting enforcement action, *see* Opp. 4, and that, as the Opposition acknowledges, "TVA has a degree of insulation from enforcement by EPA." Opp. 22 n.13.

Given the importance of this case; and the mischief that will ensue if the Eleventh Circuit's decision is allowed to stand; and the Government's thoroughly-explained confession of error, this case is ripe for summary disposition under Rule 16.1. The Eleventh

Circuit's judgment should be summarily reversed, and the case remanded for further proceedings. If the Court concludes, however, that the Eleventh Circuit's analysis – now defended only in Alabama Power's amicus brief – merits further consideration, then the Court should grant plenary review.

At a minimum, the Solicitor General's confession of error on a matter essential to the judgment merits vacatur of the decision below and remand for the lower court to consider the United States' (and perforce TVA's) new position. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (citing cases in which this Court has granted, vacated and remanded in light of "confessions of error or other positions newly taken by the Solicitor General"); *Stutson v. United States*, 516 U.S. 163, 183 (1996) (noting that practice of GVRing upon confession of error by the Solicitor General is "well entrenched") (Scalia, J., dissenting); Robert L. Stern, *et al.* SUPREME COURT PRACTICE at 317-18 (8th ed. 2002) (citing other cases in which court has "GVR'd" based upon confessions of error or changes of position by the Solicitor General).

II

If the Court Grants Plenary Review on the Ongoing Violation Question, it Should Also Review the Eleventh Circuit's Erroneous Application of the Concurrent Remedy Doctrine and its Misreading of the CAA's Notice Requirement

If the Court grants review and sets this matter for full consideration, then the concurrent remedy issue should also be considered. (The issue would need to be

addresssed only if the Court were conclude, like the Eleventh Circuit, that the violations here were not ongoing).

The government's argument that the Eleventh Circuit's decision could be upheld through a "borrowing" analysis is incorrect. Opp. 24. The government failed to identify any statute that could be "borrowed" that would bar petitioners' claims for injunctive relief. The cases cited by the Government are also inapposite.[4] Indeed, the Government's "borrowing" point is contradicted by its own brief (Opp. 18), which analogizes petitioners' claims to temporary nuisance claims, claims not subject to statutes of limitations. *See* Pet. 31.

In *United States v. Telluride*, 146 F.3d 1241 (10th Cir. 1998), cited at Opp. 26, the government successfully urged the very same argument regarding the inapplicability of the concurrent remedy doctrine that petitioners advance here. *See* Brief of Petitioner-Appellant in No. 97-1236 at 27-39 (10th Cir. Sept. 2, 1997). Under the government's argument in *Telluride*, the concurrent remedy doctrine would not bar injunctive relief regardless of whether the plaintiff is the United States or a private attorney general. Accordingly, given the Eleventh Circuit's failure to follow the precedents of this Court in applying the concurrent remedy doctrine, and given that its

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[4]L The two cases cited in the Government's brief, *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); and *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520-1521 (9th Cir. 1987), have nothing to do with applying a limitations period to bar claims for injunctive relief.

incorrect analysis could be applied to *any* action for injunctive relief, *see, e.g., Federal Election Commission v. Christian Coalition,* 965 F. Supp. 66, 70-72 (D.D.C. 1997), review should be granted.

Finally, if the Court grants plenary consideration, it should grant review of the Eleventh Circuit's ruling upholding the dismissal of petitioners NSPS claims for alleged inadequacy of notice. While perhaps not independently cert-worthy, the issue is of enormous practical significance. Here, in the notice letter, plaintiffs stated their good-faith belief that TVA, which to this day refuses to acknowledge that Colbert Unit 5 is even subject to NSPS regulations, was violating all of the requirements of Subpart Da. Plaintiffs complaint matched the notice letter in this regard. Subsequently, during the course of discovery, plaintiffs learned that Colbert 5 is managing to comply with some Subpart Da requirements, though it has never complied with the sulfur dioxide control requirements. The Eleventh Circuit's ruling goes far beyond the scope of the regulations, which only requires that a defendant be given sufficient notice from which sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated. 40 C.F.R § 54.3. The regulations are not so hyper-technical that they require a claim to be dismissed because plaintiffs made a good-faith error regarding the scope of a defendant's violations – errors that are almost inevitable for private plaintiffs with little or no access to the alleged violator's facilities and emissions information.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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